ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
BRIAN S. MILLER, JUDGE

DIVISION II

CA07-505

February 6, 2008

VAIL BOLLER and WYNONIA BOLLER
APPELLANTS

AN APPEAL FROM THE MADISON COUNTY CIRCUIT COURT
[CV-2004-149-2]

v.

HONORABLE KIM SMITH, JUDGE

DONALD C. BAILEY, M.D., ET AL.
APPELLEES

REVERSED AND REMANDED

Vail and Wynonia Boller are appealing the February 12, 2007 dismissal with prejudice of their medical negligence claim against appellees, Donald C. Bailey, M.D. and Orthopaedic and Sports Medicine, PLC. The Bollers argue that the trial court erred in finding that they failed to perfect service on Dr. Bailey by warning order. The Bollers also argue that, even if service by warning order was defective, the trial court erred in dismissing their case "with prejudice." We reverse and remand because the trial court erred in dismissing the case with prejudice.

Background

Dr. Bailey performed a carpel tunnel release on Mr. Boller's right hand at Northwest Medical Center on July 26, 2002. Mr. Boller's condition was not relieved by the first surgery and he had two additional surgeries, with the final

surgery being performed by Dr. Bailey on August 23, 2002. Ultimately, Mr. Boller's little finger was amputated on April 3, 2003.

On July 26, 2004, the Bollers filed a medical malpractice suit against Dr. Bailey and Northwest. Orthopaedic and Sports Medicine, PLC (the Clinic) was also named as a defendant in the complaint because it was Dr. Bailey's employer. The complaint alleged that the Clinic was liable for Dr. Bailey's actions. The Bollers had difficulty obtaining service on the defendants and obtained two orders extending the time for service. The first order, entered on March 11, 2005, extended the deadline for service to July 8, 2005. The second order, entered on July 5, 2005, extended the deadline for service to November 5, 2005. Northwest answered on November 9, 2004, denying generally all allegations of negligence.

The Bollers were unable to gain personal service on Dr. Bailey. Therefore, on February 23, 2005, they filed an affidavit for warning order with the Madison County Circuit Clerk. This was the case, although Dr. Bailey's residence and medical practice were in Washington County. Moreover, there is nothing in the record indicating that Dr. Bailey owned property in, or had any contacts with, Madison County.

The affidavit for warning order followed all of the requirements set forth in Rule 4(f) of the Arkansas Rules of Civil Procedure. Attached to the affidavit were copies of the failed returns of service, and a copy of the envelope showing that the affidavit for warning order was being delivered by certified mail to Dr. Bailey's last known address.

The warning order for Dr. Bailey was issued by the circuit clerk on February 23, 2005 and was published in the *Madison County Record* on March 2 and March 9, 2005. A publisher's affidavit verifying the dates of publication was filed with the circuit clerk on April 6, 2005.

The Bollers attempted to personally serve Dr. Bailey again on August 5, 2005. The private process server, Sheri Brooks, filed an affidavit of service with the circuit clerk indicating that she served the complaint and summons on Dr. Bailey by "Personal Delivery to Defendant or Respondent," at his home located at 500 H Fairway Circle, Springdale.

The Bollers non-suited Northwest on September 23, 2005. When neither Dr. Bailey nor the Clinic responded to the complaint, the Bollers moved for a default judgment on December 12, 2005. The Bollers, however, failed to comply with Rule 4(f)(4) of the Arkansas Rules of Civil Procedure which mandates that, before taking a default judgment, the party seeking the judgment must file an affidavit certifying that thirty days have elapsed since the warning order was first published.[1] Notwithstanding this defect, the default judgment was entered on December 15, 2005. The court held a damages hearing and then entered a final order of judgment on January 19, 2006, awarding the Bollers damages in the amount of $326,651. The Bollers then began collection efforts.

Dr. Bailey and the Clinic moved to set aside the default judgment on April 6,

[1] This affidavit was not filed until April 28, 2006, well after the default judgement had been entered.

2006, alleging a lack of personal service and that the common defense doctrine precluded the default judgment because Northwest had filed an answer denying, generally, all of the allegations in the complaint. The evidence presented at the hearing on April 17, 2006, showed that personal service on Dr. Bailey was defective. Consequently, the trial court ruled on April 19, 2006, that the Bollers failed to perfect personal service on Dr. Bailey. The court ordered the parties to brief the issue of whether Dr. Bailey was properly served by warning order.

On July 17, 2006, appellees moved to dismiss the Bollers' complaint, alleging that no personal service had been made on Dr. Bailey; that the statute of limitations had now expired; and that since the complaint against Dr. Bailey should be dismissed with prejudice, the complaint against the Clinic should likewise be dismissed with prejudice. In a supplemental order, entered November 9, 2006, the court set aside the default judgment against Dr. Bailey due to lack of personal service as well as the common defense doctrine and the court set aside the default judgment against the Clinic due to the common defense doctrine.

The court heard appellees' motion to dismiss on October 26, 2006 and issued a letter opinion on January 19, 2007, dismissing with prejudice all claims against Dr. Bailey and the Clinic. The court treated appellees' motion to dismiss as a motion for summary judgment and held that service by warning order on Dr. Bailey was invalid and that the malpractice at issue was alleged to have occurred in July and August 2002. Consequently, the claims against Dr. Bailey were time barred. The court also dismissed with prejudice the claims against the Clinic

because all of the Bollers' claims against it were derivative of their claims against Dr. Bailey. The order of dismissal was entered on February 12, 2007 and this appeal followed.

On appeal, the Bollers do not contest the court's order setting aside the default judgment against appellees. They, however, argue that the warning order complied with the rules of civil procedure and was therefore sufficient to perfect service on Dr. Bailey. They argue in the alternative that, even if the court was correct in holding that the warning order was invalid, the court erred in dismissing their case with prejudice.

Standard of Review

Summary judgment is to be granted by a circuit court when there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Stromwall v. Van Hoose*, ___ Ark. ___, ___ S.W.3d ___ (Oct. 11, 2007). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and documents filed by the parties. *Id.*

Service by Warning Order

Whether the Bollers' service by warning order was sufficient presents a number of constitutional issues regarding Dr. Bailey's right to due process. This is true because the record shows that the affidavit of warning order was filed in Madison County, that the warning order was issued in Madison County, and that the warning order was published in a newspaper in Madison County. The record also shows that the Bollers were aware that Dr. Bailey had no contacts with Madison County, but that he maintained his residence and office in Washington County.

"Inasmuch as this case can be disposed of without determining the constitutional question, it is our duty to do so." *Solis v. State*, ___ Ark. ___, ___ S.W. 3d ___ (Dec. 6, 2007) (*quoting Herman Wilson Lumber Co. v. Hughes*, 245 Ark. 168, 173, 431 S.W.2d 487, 490 (1968)). We decline to reach the Bollers' argument that they effectively served Dr. Bailey by warning order, because we are presented with another basis upon which to decide this case. *See Solis*, *supra*.

Dismissal

The trial court erred when it dismissed the Bollers' complaint with prejudice. This is true because our supreme court has held that:

> to toll the statute of limitations period and to invoke the saving statute, a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant. A court's later ruling finding that completed service invalid does not disinherit the plaintiff from the benefit of the saving statute. Our interpretation of § 16-56-126 meets with the liberal and equitable construction which must be given it in order to give litigants a

> reasonable time to renew their cause of action when they are compelled to abandon it as a result of their own act or the court's.

Forrest City Machine Works, Inc. v. Lyons, 315 Ark. 173, 177, 866 S.W.2d 372, 374 (1993).[2] Indeed, the record clearly shows that the complaint was timely filed; that the Bollers timely moved for extensions of the deadline to obtain service; that the court granted the Bollers' requests; and that prior to the deadline for obtaining service, a process server served the summons and complaint to someone purporting to be Dr. Bailey, at his home in Springdale. The process server then filed an affidavit of service with the circuit clerk indicating that she personally served the complaint and summons on Dr. Bailey at his home. Although the trial court later determined that the service was invalid, that finding did not "disinherit" the Bollers from the benefit of the saving statute. *See id.* Therefore, the dismissal should have been without prejudice.

For these reasons, we reverse the trial court's order of dismissal with prejudice and remand for the trial court to enter an order consistent with this opinion.

Reversed and Remanded.

MARSHALL and VAUGHT, JJ., agree.

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[2]*See Clause v. Tu*, ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 6, 2008), for a detailed analysis of this area of the law.